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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

RUBY HOWARD,

Petitioner,

v.

THE NEW YORK TIMES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

RUBY HOWARD
Petitioner pro se
400 Matawan Avenue
Ken Gardens #18A
Cliffwood, NJ 07721
(732) 290-7388

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
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Report and Recommendation of Hon. Ronald L. Ellis dated July 27, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUBY HOWARD,

Plaintiff,

-against-

REPORT AND RECOMMENDATION

INDEX DEPARTMENT C/O NEW YORK TIMES,

00 Civ. 2985 (LAK) (RLE)

Defendant.

To the HONORABLE LEWIS A. KAPLAN, U.S.D.J

Pro se plaintiff Ruby Howard has brought this employment discrimination action against her former employer, The New York Times, claiming that defendant failed to promote her, retaliated against her, and ultimately terminated her on the basis of race and disability in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e17, and the American with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. §§12112-12117. Howard seeks twenty million dollars in compensatory and punitive damages. The New York Times has moved to dismiss all claims against it on the grounds that they are time-barred and barred by the doctrine of *res judicata*. For the reasons set forth below, I recommend that defendant's motion be GRANTED.

I. BACKGROUND

Howard worked for The New York Times Company (the "Times") from 1969 until she was terminated in 1985. This is the third complaint filed by Howard concerning her employment with the Times. In 1986, Howard sued the Times for race discrimination in violation of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e17. *See* Howard v. Holmes, 656 F. Supp. 1144 (S.D.N.Y.1987) ("Howard I").[1] The Court granted summary judgment to defendant on March 17, 1987, finding that (1) certain of the alleged adverse employment actions were time-barred, because they were brought to the EEOC "well outside the [300-day] statute of limitations period",[2] (2) Howard had failed to demonstrate a prima facie case of race discrimination as to her retaliation claim, because

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[1] While the defendant named in the first lawsuit was "Holmes," the Court noted that "The Times...is the actual defendant." Id. A detailed account of the alleged discriminatory conduct by the Times can be found in the court's 1987 decision. Id.

[2] Howard challenges this finding by noting the "complaint was received on January 2, 1986, filed, docketed and assigned to Judge Goettel on January 30, 1986, well within the 300-day limitation called for in the Right to Sue letter dated November 4, 1985." See Pl. Opp., at 2. This statement misstates the law. Under Title VII, a plaintiff must file her claim with the EEOC within 300 days of the "alleged unlawful employment practice." 42 U.S.C. §2000e-5(e)(1) (emphasis added). If she does not do so, it is time-barred. Howard confuses this requirement with the 90-day period to file a suit in federal court once a right to sue letter is issued. See 42 U.S.C. §2000e-5(f)(1). While Howard's complaint was indeed filed within 90 days of the issuance of the right to sue letter, her 1984 EEOC charge concerned among other claims, an alleged failure to promote and a demotion which occurred seven to nine years earlier, these claims were properly dismissed as time-barred. *See* Howard I, 656 F. Supp. at 1147.

she did not demonstrate a causal connection between the protected activity (here, filing an EEOC charge) and the alleged adverse employment action (her termination), and (3) even had Howard established a prima facie case, she failed to overcome the defendant's assertion that she was terminated because of a long history of insubordination and failure to respond to discipline.[3] *Id.* Howard did not file a timely appeal of the court's decision.

In 1998, Howard filed a second complaint challenging the same allegedly discriminatory conduct ending in 1985, but this time she sued under both Title VII and the ADA. *See* Howard v. New York Times Company, No.98 Civ. 5219 (S.D.N.Y. July 23, 1998) ("Howard II"). Judge Griesa dismissed the complaint *sua sponte* for failing to state a claim pursuant to 28 U.S.C. §1915(e)(2)(b)(ii), finding that Howard has not filed a claim with the EEOC within 300 days of her termination as required by 42 U.S.C. §2000e5(e)(1).[4] Because the complaint was dismissed before the defendant was served, it appears that the Court was not aware at the time of its decision that the

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[3] While Howard's original charge did not include a claim of discriminatory discharge because she was terminated after it was filed, the Court exercised its jurisdiction over that claim as "reasonably related to or growing out of the acts alleged in the charge." Id. at 1146 n.4.

[4] Howard alleges in her opposition that the complaint was dismissed because she neglected to include a right to sue letter. *See* Pl. Opp at 2-3. This is not the case. The Court dismissed her complaint because she had not filed an EEOC charge within 300 days of her termination. *See id.* at 2-3. Even had Howard attached her 1985 right to sue letter from Howard I to her 1998 Howard II complaint, this would not have changed the outcome, as she urges. *See* Pl. Opp at 2-3. That letter pertained to her 1984 EEOC demotion on the basis of race in the 1970's, not her 1985 discharge.

allegations in the complaint had already been fully adjudicated in 1987. Howard appealed the decision, and the Second Circuit affirmed on three grounds. First, it found that because the ADA, which became effective in 1992, is not retroactive, Howard's disability claims must fail. *See* Howard v. New York Times Company, Inc., 182 F.3d 899 (2d Cir. 1999) (table), 1999 WL 876080, at *1, *cert. denied*, 120 S. Ct. 799 (2000). The panel held that Howard's Title VII claims were precluded under *res judicata*, as an earlier case "resolved the issues presently raised by Howard..." Id.[5] Finally, the panel held that the district court was correct in finding that Howard's Title VII claims were time barred, because she failed to meet the administrative filing requirements of Title VII. Id.

II. ANALYSIS

In reviewing a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See* Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996) A complaint may not be dismissed under Rule 12(b)(6) unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir.1998) quoting Conley v. Gibson, 355 U.S. 41, 45-46(1957)). In other words, the issue before the Court on motion to dismiss "is not whether...plaintiff will ultimately prevail but whether the claimant is entitled to

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[5] By the time of Howard's appeal, defendants had learned of her second lawsuit and apprised the Second Circuit of the 1987 decision.

offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (citation omitted), *cert. denied*, 519 U.S. 808 (1996). Moreover, where, as here, plaintiff is proceeding *pro se*, her complaint and supporting papers must be read "liberally" and interpreted to "raise the strongest arguments that they suggest." Soto v. Walker, 44 F.3d 169, 173 (2d Cir. 1995) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir.1994).

Howard's complaint plainly states that the alleged discriminatory acts occurred from 1976 until 1985, and that "on March 27, 1987, Judge Goettel...granted summary judgment to [*sic*] the plaintiff's complaint against Harvey Holmes of the New York Times." Compl. at 3-4. On the basis of these facts, the complaint should be dismissed in its entirety as *res judicata* and because the ADA does not apply retroactively.

The remaining allegations in the present complaint concern alleged misconduct by the defendants in the previous proceedings before this court, including allegations that the defendant falsified affidavits and transcripts, defamed plaintiff's character in memoranda, and presented briefs and documents to the court ex parte. *See* Compl. at 5-6; Pl. Opp. at 3-6. These allegations, even if accepted as true, do not support Howard's claims that the Times discriminated against her from 1979 to 1985. They are allegations regarding attorney misconduct and the fairness of the proceedings in Howard I that should have been properly brought before Judge Goettel in 1987 or an appropriate disciplinary body, and this Court does not have jurisdiction to here them, at least in the context of this case.

For the foregoing reasons, I recommend that defendant's motion to dismiss be GRANTED in full. I also recommend that this Court enjoin Howard from filing, without leave of Court, any further complaints against the Times concerning its alleged discrimination against her during her employment there from 1979 to 1985.

Pursuant to Rule 72, Federal Rules of Civil Procedure, the parties shall have ten (10) days after being served with a copy of the recommended disposition to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable Lewis A. Kaplan, 500 Pearl Street, Room 1310, and to the chambers of the undersigned, Room 1970. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See* Thomas v. Arn, 472 U.S 140, 150(1985); Small v. Secretary of Health and Human Services, 892 F.2d 15, 16 (2d Cir. 1989) (*per curiam*); 28 U.S.C. §§636(b)(1) (West Supp. 1999); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: July 27, 2000
New York, New York

Respectfully submitted,

/s/ Ronald L. Ellis
The Honorable Ronald L. Ellis
United States Magistrate Judge

Copies of this Report and Recommendation were sent to:

Ruby Howard
P.O. Box 8336
New York, NY 10116
Pro Se

Adam Liptak
229 West 43rd Street
New York, NY 10036
Attorney for Defendant